UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANDREW M. RACKERS, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER CH-0752-97-0218-I-1 DATE: JUL 23, 1998

Thomas G. Roth, Esquire, Fleming, Roth & Fettweis, Newark, New Jersey, for the appellant.

Kord H. Basnight, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of the July 2, 1997 initial decision that sustained his removal. For the reasons set forth below, we GRANT his petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision with regard to Charges 3 and 4, and AFFIRM the initial decision as MODIFIED by the Opinion and Order, STILL SUSTAINING the appellant's removal.

BACKGROUND

The appellant was a GS-13 Criminal Investigator (Special Agent) with the Drug Enforcement Administration (DEA), St. Louis, Missouri Field Division, Fairview Heights, Illinois Resident Office. Initial Appeal File (IAF), Tabs 1, 3, subtab 12. He was involved in investigating a California organization headed by Michael L. Marshall, who was suspected of distributing methamphetamine. In February 1995, he was contacted by Detective Sherman Graves, Arnold, Missouri Police Department (APD), concerning the Marshall investigation. Graves had received information about Marshall's drug trafficking in St. Louis, Missouri, from Tamara Wilson, who cleaned house for Marshall and John Vitale. Vitale was being investigated by the APD for distributing methamphetamine. On February 3, 1995, the appellant met with Graves and Wilson. Sometime thereafter, the appellant and Wilson began a sexual relationship. *See, e.g.*, IAF, Tab 3, subtab 10 at 2; Tab 13 at 3; Transcript (Tr.) I at 7-11, 14, 18-20 (Testimony of Graves); Tr. II at 342-49 (Testimony of Appellant); Initial Decision (I.D.) at 1-3.

The agency subsequently conducted an investigation into the appellant's actions. On September 10, 1996, the DEA's Board of Professional Conduct proposed the appellant's removal. IAF, Tab 3, subtab 5. On December 2, 1996, Joel K. Fries, the deciding official, sustained the appellant's removal based on the following charges: misuse of office, improper association, providing false information in official documents, failure to follow written instructions (two specifications), and poor judgment. *Id.*, subtab 11. The agency removed the appellant effective December 4, 1996. *Id.*, subtab 12. The appellant then filed a timely petition for appeal of the removal. IAF, Tab 1.

After holding a hearing, the administrative judge sustained all of the charges and specifications. I.D. at 4-18. He found that the action promoted the

efficiency of the service and that removal was a reasonable penalty. I.D. at 18-20.

The appellant has filed a petition for review. Petition For Review (PFR) File, Tab 3. The agency has filed a response opposing the appellant's petition for review, PFR File, Tab 4, which it has asked the Board to accept as timely filed, *id.*, Tab 6.

ANALYSIS

The agency's response to the appellant's petition for review

In its July 29, 1997 order, the Clerk of the Board informed the agency that it must file a response to the appellant's petition for review by September 30, 1997. PFR File, Tab 2. The agency did not file its response until October 6, 1997. *Id.*, Tab 4. The Clerk of the Board informed the agency that, "[u]nder the Board's regulations," the agency had until September 30, 1997 to file its response, and gave the agency an opportunity to show good cause for the late filing. *Id.*, Tab 5. The agency filed a timely response to the Board's show-cause order. *See id.*, Tab 6.

In a sworn declaration, the agency's representative, Kord H. Basnight, stated that the agency "was served on September 10, 1997." *Id.*, Tab 6 at 1. In support of his declaration, Mr. Basnight proffered a sworn affidavit from his supervisor, Ellen Harrison, as evidence that the petition for review "was served on September 10, 1997." *Id.*, Tab 6 at 1 & n.1. In her October 9, 1997 affidavit, Ms. Harrison averred that she "receive[s] all incoming mail on a daily basis and routinely note[s] the date of receipt of time sensitive matters," such as petitions for review. *Id.*, Tab 6 at 4. Ms. Harrison further declared that on September 10, 1997, she "received" a copy of the petition for review, noted the receipt date on the petition, and informed Mr. Basnight that the agency's response was due 25 days from September 10. *Id.* Harrison stated that because October 5, 1997, was a

Sunday, she calculated that the agency had until Monday October 6, 1997, to file a response. *Id.*

Under the regulations in effect at the time, the agency had 25 days after the date of service of the petition for review to file a response. 5 C.F.R. § 1201.114(d). The Board's order, relying on the regulations, gave the agency until September 30 to file its response. The agency filed its response on October 6. *See* PFR File, Tab 6.

According to Mr. Basnight, the appellant did not serve the agency with a copy of his petition for review until September 10, 1997. The copy of the petition for review filed with the Board does not contain a certificate of service. *See id.*, Tab 3. The appellant, who is represented by counsel, has not disputed Basnight's averment that the agency was served with the petition for review on September 10. Although Ms. Harrison's affidavit indicates that the petition may have been received by the agency in the mail on September 10 (as opposed to being "served" by the appellant on that date), we find that under these particular circumstances and absent any challenge to Basnight's declaration, the agency has shown good cause to excuse the untimely filing. *See Murdock-Doughty v. Department of the Air Force,* 70 M.S.P.R. 119, 121 (1996); *Rhodes v. Department of the Treeasury,* 10 M.S.P.R. 372, 374 (1982). *But see Lapedis v. Department of Health and Human Services,* 47 M.S.P.R. 337, 340 n.2 (1991)(the fact that the agency miscalculated the time for filing its response from the date of receipt of the petition for review did not establish good cause for the untimely filing), *aff'd,* 949 F.2d 403 (Fed. Cir. 1991) (Table). We therefore have considered the agency's response.

The appellant's petition for review

General

The appellant asserts that the initial decision incorrectly stated that the hearing was held on one day, instead of two; did not mention the numerous

defense witnesses who testified at the hearing; and misinterpreted the evidence presented. He asserts that these errors alone warrant reversal. PFR at 1-5.

The appellant has not shown how a misstatement concerning the length of the hearing prejudiced his substantive rights and thus warrants reversing the initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Indeed, as the appellant admits, the administrative judge discussed the appellant's testimony, which was given on the second day of the hearing. Moreover, an administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Thus, the appellant's general assertions do not provide a basis for reversing the initial decision. To the extent that the appellant has identified specific errors made by the administrative judge, they are addressed below.

Charge 1: Misuse of Office

The agency specified as follows: The appellant was introduced to Wilson, "a Cooperating Individual (CI)"[1] for the APD in connection with a DEA investigation. On February 5, 1995, the appellant told Wilson he wanted to meet with her, picked her up to locate and identify hotels where she had reserved rooms for Marshall, and implied that she would have to rely on him and get to know him intimately to prevent charges being brought against her. In her sworn testimony to the agency's Office of Professional Responsibility (OPR) investigators, Wilson stated that the appellant told her that she would have to rely on him to avoid jail, that the women's prison was far away from her family, and that there were federal criminal charges pending against her that could result in 20 to 40 years in prison.

She stated that the appellant implied that she would go to jail if she did not have sex with him. IAF, Tab 3, subtab 5.

The agency stated that Section 2735.16M.1 of the DEA's Personnel Manual, also contained under Appendix A, Standards of Conduct, in the DEA Agents Manual, provides that no employee will, "Use his/her official position for private gain." The agency alleged that the appellant used his position to coerce Wilson into an intimate relationship by leading her to believe that criminal charges were pending against her. IAF, Tab 3, subtab 5.

The administrative judge cited Wilson's testimony as follows: She met with the appellant on February 3, 1995, to assist the authorities in investigating Marshall and Vitale. The appellant asked her detailed questions about her sexual relationships, informed her that she could spend 20 to 40 years in prison because of her involvement with Marshall and Vitale, and told her that the closest female prison was far away from her family. She agreed to be a CI for the DEA. Later in February 1995, the appellant again asked her about her sexual relationships, told her she could spend years in prison, and emphasized that she must cooperate with him. She understood from the appellant that charges were pending against her. The appellant told her that he wanted oral sex, and she agreed because she did not want to go to jail. She had sex with the appellant at least 12 times over a period of time. I.D. at 4-6.

The administrative judge cited the appellant's testimony as follows: The appellant was aware of Wilson's connection to Marshall prior to their meeting and was concerned that Wilson might be involved in drug trafficking. On February 3, 1995, the appellant had a meeting with Graves, Wilson, Detective Jeffrey Roorda, APD, and Kevin Martens, Special Agent, Internal Revenue Service. He did not

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[1] Apparently, the agency has used the acronym "CI" to refer to both cooperating individual and confidential informant. IAF, Tab 3, subtab 5. Accordingly, we

know that Wilson was a CI for the APD. He determined on February 3, 1995, that he had no evidence against Wilson implicating her in drug trafficking. He met with Wilson several times thereafter and had a sexual relationship with her, alone and in a group, from April through July 1995. He did not force the appellant to have sex with him or with his friends and he did not threaten her with jail. I.D. at 6-7.

The administrative judge cited Graves's testimony that, at the February 3, 1995 meeting, he told the appellant that Wilson was a CI, that the appellant asked irrelevant questions about Wilson's sexual relationships, and that the appellant informed Wilson that she could spend 20 to 40 years in prison because of her association with Marshall and Vitale. I.D. at 8. He cited Roorda's testimony that the appellant told Wilson that she faced as many as 40 years in prison, but that, if she cooperated, she could be given assistance. I.D. at 8-9. He cited the testimony of Susan Nave, DEA Special Agent/Polygraph Examiner, that she administered a polygraph examination to Wilson and determined that Wilson was telling the truth when she stated that the appellant led her to believe that she would go to jail if she did not have sexual relations with him and that she was a CI for the DEA. I.D. at 9-10.

The administrative judge found that the results of the polygraph examination enhanced Wilson's credibility. He further found that the testimony of Graves, Roorda, and Nave was credible. I.D. at 9-10. He found that the appellant knew that Wilson was associated with Marshall, that he did not submit any reports concerning his interviews with Wilson, and that he did not give a reasonable explanation for his failure to do so. I.D. at 11. He concluded that the agency proved by preponderant evidence that the appellant misused his office to have sexual relations with Wilson by leading her to believe that charges were pending against her and that she could serve 40 years in prison. I.D. at 11-12.

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have used CI to refer to both.

The appellant asserts that the administrative judge erred in ignoring the testimony he presented supporting his testimony that Wilson voluntarily engaged in a sexual relationship with him. He cites the testimony of Sgt. David Roth, Illinois Police Department; Lt. Mark Emert, Affton, Missouri Fire Protection District; and Evelyn Brown, a personal friend; who all had sexual relations with Wilson, as showing that his relationship with Wilson was voluntary. He also cites evidence presented in OPR reports and Wilson's own testimony as showing that she was promiscuous. PFR at 21-28.

Roth's and Emert's testimony cited by the appellant, even if credible, shows basically that Wilson desired a sexual relationship with them. PFR at 22-25. Admittedly, the appellant cited their testimony that Wilson complained that the appellant did not return her pages when she called him for sex and that they, the appellant, and Wilson sometimes engaged in group sex, which Wilson enjoyed. PFR at 23-25. However, this testimony does not show that Wilson was not initially coerced into having sex by the threat of a lengthy prison sentence far away from home for criminal charges that had not been brought against her. Similarly, Brown's testimony that Wilson appeared to enjoy sex with the appellant, PFR at 25, does not show that Wilson was not initially coerced into it. The appellant's citations to the OPR reports and Wilson's own testimony show that Wilson was promiscuous. PFR at 26-28. The appellant, however, has not explained how this shows that his evidence is more credible than that relied on by the administrative judge, especially since that evidence shows that the appellant and his witnesses were also promiscuous.

The appellant asserts that the administrative judge confused two conversations in finding that Graves's and Roorda's testimony supported Wilson's claim that the appellant implied that Wilson would go to prison if she did not have sex with him. He asserts that, at the initial February 3, 1995 meeting with Wilson, all of the law enforcement officials tried to pressure Wilson to be more

cooperative by suggesting that she could go to prison if she was not. He contends that these statements had nothing to do with sex and thus did not support Wilson's claim that the appellant, when they were alone, implied that she would go to prison if she did not have sex with him. PFR at 28-30.

The initial decision does not show that the administrative judge confused the conversations. The administrative judge cited Graves's and Roorda's testimony as showing that the appellant informed Wilson that she faced a possible 20-40 year prison sentence. I.D. at 8-9. His credibility findings do not reveal that he used Graves's and Roorda's testimony to support a finding that the appellant explicitly threatened Wilson with prison if she did not have sex with him. I.D. at 11.

The appellant also asserts that Roth's and Wilson's testimony shows that, when Wilson specifically asked if there were any charges against her, the appellant told her that there were not. PFR at 30. Wilson testified, however, that she stopped seeing the appellant after he told her that no charges were pending against her. Tr. I at 284, 344. Roth did not remember when this conversation occurred. Tr. II at 198. Thus, the testimony does not show that the appellant never led Wilson to believe that charges were pending against her.

The appellant asserts that Wilson's testimony was incredible, perhaps because of psychological problems, because she contradicted the other witnesses' testimony that her sexual activity was voluntary. PFR at 31-32. Again, however, the appellant has not explained how Wilson's general promiscuity shows that the administrative judge erred in sustaining the agency's charge that he misused his position by coercing her into a sexual relationship.

The appellant asserts that the administrative judge erred in relying on the results of the polygraph examination as supporting Wilson's credibility because the results were invalid. He contends that the polygrapher was inexperienced, Wilson intentionally misled the polygrapher when she stated that she had no

psychological problems, and the questions were incorrectly worded because they asked what the appellant led Wilson to believe instead of what the appellant told Wilson. PFR at 32-33. The appellant has not supported his assertion that Nave was inexperienced. Nave testified that she had received 14 weeks of training and had graduated from the Department of Defense Polygraph Institute. Tr. I at 204-06. She testified that she had administered 25 polygraph examinations before Wilson's. Tr. I at 230. Similarly, the appellant has not supported his opinions that Wilson had undisclosed psychological problems that invalidated the examination or that Nave's questions were improperly worded.

The appellant asserts that Wilson had a motive to lie because she was considering suing the appellant and DEA, and that Graves told her that the government could never prosecute her on criminal charges if she made certain allegations against the appellant. He also contends that the administrative judge erred in finding that Graves and Roorda had no bias against him because Graves admitted that he was angry at the appellant, Roorda had Graves sign a statement for him even though he disagreed with some of its contents, and Graves had a motive to deflect attention away from Graves's affair with another CI. PFR at 33-35. The appellant's imputation of possible motives to other witnesses, however, does not show error in the administrative judge's determination that their testimony was more credible than the appellant's.

The appellant asserts that the administrative judge did not mention that other witnesses testified to his general integrity and credibility. PFR at 35-36. He has not asserted, however, that these unidentified witnesses had firsthand knowledge of the particular incidents involved in this case. *See Marques*, 22 M.S.P.R. at 132.

Thus, we find that the appellant has failed to show that the administrative judge erred in sustaining Charge 1.

Charge 2: Improper Association

The agency specified as follows: The appellant began a sexual relationship with Wilson, which included oral sex, sexual intercourse, and group sex, while she was working as a CI for the APD. The appellant acknowledged a sexual relationship, but contended that he did not consider Wilson to be a CI. Although the appellant did not officially establish Wilson as a CI for DEA, she was indexed in DEA's investigation; he was informed by APD detectives that Wilson was acting as a CI for them; through her cooperation with APD, she made three telephone recordings and attempted to use a body wire to record a conversation in connection with the investigation; and the appellant indicated in his November 24, 1995 seizure form regarding the seizure of $3,000 on February 25, 1995, that Wilson was cooperating with Roorda. IAF, Tab 3, subtab 5.

The agency stated that Section 2735.16M.10 of DEA's Personnel Manual, also contained under Appendix A, Standards of Conduct, DEA Agents Manual, prohibits employees from associating with individuals known or suspected to be involved in illegal drug trafficking or other criminal activity, including informant contacts, in other than a strictly professional capacity. It expressly prohibits extrinsic social, financial or business contacts. Section 6612.31B of the DEA Agents Manual states that agent/cooperating individual contacts will be of a strictly professional nature, and expressly prohibits extrinsic social or business contacts. A February 3, 1994 memorandum from the DEA Acting Administrator stated that the DEA Agents Manual and the Standards of Conduct require that all contacts between DEA employees and informants be strictly professional; extrinsic social and business contacts are explicitly forbidden; and any social, sexual, financial or business relationship between a DEA employee and an informant, former informant or suspected criminal presents the appearance of misuse of office for personal gain. IAF, Tab 3, subtab 5.

The agency alleged that the appellant engaged in a sexual relationship with Wilson even though he was aware of her involvement in the investigation. The

agency charged that the relationship was inappropriate and constituted improper association. IAF, Tab 3, subtab 5.

The administrative judge found that the credible evidence showed that the appellant was introduced to Wilson as a CI for the APD, that he met with Wilson numerous times while she was designated as a CI by the APD, that he was aware of her involvement in the Marshall investigation, and that he nevertheless engaged in a sexual relationship with her over an extended period of time while she was a CI. He found that the appellant's sexual relationship with Wilson was prohibited under the agency's regulations. I.D. at 12-13.

The appellant asserts that the administrative judge sustained the charge based on his finding that Wilson was a CI for the DEA. He asserts that his relationship with Wilson did not violate DEA rules because Wilson was not a documented DEA informant and DEA rules do not govern CIs of other agencies. He also asserts that his relationship with Wilson did not violate DEA rules because Wilson was not a criminal or a suspected criminal. He further asserts that, at the time he had the relationship with Wilson, she was not a CI for anyone. PFR at 37-49.

The appellant, however, was the Criminal Investigator in charge of the DEA investigation. He has not explained who else would have been responsible for documenting Wilson as a DEA informant. Accepting his argument would allow him to defeat the agency's charge simply because he chose not to do so. The relevant issue is not whether Wilson was documented as a DEA informant, but whether she acted as one and thus should have been so documented.

Even though the record evidence does not show that Wilson was documented officially as a DEA informant, *see* Tr. II at 135, Preston L. Grubbs of the agency's Office of Professional Responsibility stated that, in his opinion, contacts with CIs are prohibited, even though they may be CIs for other law enforcement agencies. *See id.* at 19. Grubbs stated that for the definition of

"informant," one would look to the DEA's agent's manual, and that in his view the manual prohibits social contacts with any informant. *See id.* at 22, 27. Detective Roorda stated that the APD signed Wilson up as a confidential informant in late January or early February 1995, and then called the DEA into the investigation because the scope of the investigation was beyond APD's resources. *See id.* at 133-34. Wilson was therefore a CI of the APD during the relevant time period.

The evidence further establishes that the appellant knew Wilson was a CI when he coerced her into having sex with him and continued the sexual relationship. The record shows that the appellant was at a February 3, 1995 meeting where Wilson was asked questions regarding Marshall's alleged criminal activity, and the appellant himself directed Wilson to wear a "wire" to record conversations regarding Marshall's activities. *See id.* at 21, 30, 33. In addition, Detective Graves stated that he told the appellant when he (Graves) first spoke to the appellant about Wilson that she was an informant, and he introduced Wilson to the appellant as an informant. *See id.* at 18, 29. Roorda provided supporting testimony on this point. *See id.* at 141.

The evidence also supports a finding that Wilson should have been documented as a DEA informant. For example, Resident Agent in Charge Timothy A. Brunholtz, the appellant's first-line supervisor, testified that an individual acting under the direction of a DEA agent, which Wilson was doing, should be documented as a DEA informant. Tr. I at 378; *see also* Tr. II at 31 (Testimony of Grubbs). Further, David Roth, a DEA agent who worked with the appellant on the Marshall matter, stated that, in his view, when Wilson agreed to work with the DEA she was a "cooperating individual" because she had information on a criminal suspect and was helping to obtain further information via recorded telephone calls with Meyers. *See id.* at 175. In this regard, deciding official Fries testified that the appellant's activities with Wilson in an official

capacity "certainly indicate" that she was being used as a CI. Tr. II at 76-77; *see also* Tr. II at 111. Fries testified that the appellant should have signed Wilson up as a CI. Tr. II at 114.

For the above reasons, we find that the appellant has failed to show that the administrative judge erred in sustaining Charge 2.

Charge 3: Providing False Information in Official Documents

The agency specified as follows: On February 25, 1995, Roorda used Wilson to obtain $3,000 from Vitale to give to Marshall in connection with methamphetamine trafficking. Wilson wore a body wire, allowing the transaction to be tape recorded. The appellant helped arrange the operation, but did not show up. Roorda gave the appellant the report that he wrote, which referred to the tape. On March 7, 1995, the appellant took possession of the report and the money for federal forfeiture, but not the tape. According to Roorda, the tape contained an incriminating conversation that could have connected Vitale to Marshall in a conspiracy. IAF, Tab 3, subtab 5.

The agency stated that the appellant's case file did not contain a copy of Roorda's report and the appellant's November 24, 1995 seizure form indicated that the money was obtained from the APD on November 21, 1995. In the probable cause section of the seizure form, the appellant stated that Wilson turned the money over to Roorda on May 3, 1995, at Wilson's residence; Roorda maintained custody of the money as evidence in a pending state case; on November 21, 1995, Roorda advised the appellant that the money was no longer needed as evidence in the state case; and Roorda turned the money over to the appellant for federal forfeiture. IAF, Tab 3, subtab 5.

The agency stated that the appellant later stated that Wilson had turned over the evidence on March 3, 1996, and that he picked up the money on March 7,

1996, not November 21, 1995.[2] The probable cause statement did not mention the February 25, 1995 undercover operation or the tape. Assistant U.S. Attorney (AUSA) Massey had to resubmit the publication notice on the forfeiture because the original notice had a seizure date of November 21, 1995, based on the information provided by the appellant. The AUSA trying the case in which the seizure of the $3,000 was relevant was not aware that the money had been seized during an undercover operation and that a detailed APD report and tape existed. The agency charged that the appellant's failure to properly report the "dates and details" related to the seizure of the $3,000 constituted providing false information in official documents. IAF, Tab 3, subtab 5.

The administrative judge cited Roorda's testimony as follows: Vitale had asked Wilson to transfer $3,000 in front money to Marshall for methamphetamine. Roorda, Graves, and the appellant agreed that Wilson should do so. On February 25, 1995, Wilson was wired so that the transaction could be tape recorded. The appellant planned to be present for the operation, but was not. The operation went as planned and Wilson transferred the $3,000 to Roorda. On March 7, 1995, Roorda gave the appellant a copy of the report that he wrote, which referred to the tape recording, and the $3,000 for federal forfeiture. I.D. at 14.

The administrative judge found that Roorda testified, without dispute, that the appellant's probable cause section in the November 24, 1995 seizure form was completely inaccurate. Specifically, Wilson gave the $3,000 to Roorda on February 25, 1995, not May 3, 1995, and at a location other than her residence; Roorda did not maintain custody of the $3,000 as evidence in a pending state case, but only from February 25 through March 7, 1995, the time needed to

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[2] The 1996 dates in the agency's notice of proposed removal are obviously typographical errors meant to refer to 1995. The appellant has not asserted that

transfer the money to the appellant; and Roorda never informed the appellant that there was a state case. I.D. at 14-15.

The administrative judge also cited the appellant's testimony that the November 24, 1995 seizure form incorrectly stated that the money was seized from Wilson on November 21, 1995; that it incorrectly stated that Wilson turned the money over to Roorda on May 3, 1995; and that there were many other inaccurate statements in it. I.D. at 15-16. Based on the testimony of Roorda, the seizure form, and the appellant's admissions, the administrative judge found that the appellant failed to correctly report the dates and details related to the seizure of the $3,000 and that he provided false information intentionally or with reckless disregard for the truth. I.D. at 13-16.

The Board adjudicates the charge as it is described in the agency's proposal and decision notices. *See, e.g., James v. Department of the Air Force*, 73 M.S.P.R. 300, 303-04 (1997). The charge indicates only that the appellant committed the following falsifications in the November 24, 1995 seizure form: 1. Stated that Wilson turned the money over to Roorda on May 3, 1995, instead of March 3, 1995; 2. stated that he picked up the money on November 21, 1995, instead of on March 7, 1995; and 3. did not mention the February 25, 1995 undercover operation, the tape, or the APD report. IAF, Tab 3, subtab 5.

The appellant asserts that the administrative judge erred in sustaining the falsification charge based on the appellant's reference to May 3, 1995, because he testified that it was simply a typographical error and that he meant to refer to March 3, 1995, the date that Roorda told him that he had obtained the $3,000 from Wilson. He further asserts that deciding official Fries, testified that he did not consider the May 3, 1995 reference to be an intentionally false statement. PFR at 6-8.

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he was misled by these errors.

The appellant is correct in asserting that the administrative judge took his admission that the May 3, 1995 date was wrong out of context because he stated that it was a typographical error. Tr. II at 387-88. He is also correct in asserting that Fries testified, concerning the May 3, 1995 reference, that he "could not find any intent to that date and so I did not consider it as a, necessarily a false statement." Tr. II at 149. Thus, we find that the administrative judge erred in citing the appellant's reference to May 3, 1995 to support his finding that the agency proved Charge 3.

The appellant asserts that the administrative judge also erred in sustaining the falsification charge based on the appellant's reference to November 21, 1995 as the seizure date. He asserts that, although he admitted that November 21, 1995 was not the date the money was seized, he explained that he put that date on the seizure form because that was the date Roorda told him the money was no longer needed in his state investigation. He asserts that his testimony was corroborated by that of Brunholtz and Roth. He contends that Brunholtz knew that the money was actually seized on March 7, 1995, because Brunholtz placed it in his safe, and knew that the appellant put November 21, 1995 on the seizure form because he signed it as the appellant's supervisor. He asserts that Roth testified to Roth's similar actions in another case. He further contends that there was a parallel state investigation by APD occurring at the time. PFR at 8-16.

We find that the administrative judge erred under *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), and *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980), when he failed to even mention that Brunholtz provided relevant and material testimony in this case. Obviously, then, he did not perform the functions that are normally within the province of the administrative judge of resolving conflicts in the evidence and deciding issues of credibility. However, when the record is sufficiently well-developed and the Board is not basing its findings on the witnesses' demeanor, we may address those

issues without a remand. *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994). We find that because the record is sufficiently well-developed and we are not basing our findings on the demeanor of witnesses, we can resolve conflicts in the evidence on Charge 3 at the Board level.

To sustain a falsification charge, the agency must prove, not only that the information was incorrect, but that the employee knowingly supplied incorrect information with the intention of defrauding the agency. *See, e.g., Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986); *Deskin v. U.S. Postal Service*, 76 M.S.P.R. 505, 510 (1997). Plausible explanations are to be considered in determining whether the incorrect information was supplied intentionally. The issue of the employee's intent to deceive must be resolved from the totality of the circumstances. *Deskin*, 76 M.S.P.R. at 510-11.

Here, the appellant provided the explanation that he put the November 21, 1995 date on the seizure form because, up until that date, he believed that the money might be used in an Arnold Police Department criminal state case. Tr. II at 355. Brunholtz testified that, under such circumstances, the November 21, 1995 date was accurate because the funds were not actually being pursued as a forfeiture in March 1995, and thus the actual seizure date would be when those funds became available for federal forfeiture. He testified that, under these circumstances, he would also have put a seizure date of November 1995 on the seizure form. Tr. I at 370. Indeed, as asserted by the appellant, Brunholtz testified that he signed the form. Tr. I at 371. The agency has not asserted that Brunholtz, who was the agency's witness, was not credible. Therefore, we find no basis for discrediting his testimony.

Admittedly, Brunholtz's testimony that the appellant's actions were proper was based on his belief that the money "may be used in an Arnold criminal state case." Tr. I at 355. The administrative judge cited Roorda's testimony that he never informed the appellant that there was a state case. I.D. at 15; *see* Tr. I at

163. However, Roorda also admitted that his investigation into Vitale was just beginning when he met with the appellant on February 3, 1995. Tr. I at 169. He further admitted that his statement that there was no state case did not mean that there was no state investigation occurring. Tr. I at 176.

Furthermore, Brunholtz testified that the appellant turned the money over to him in early March 1995, that he put it in his safe, and that it stayed in the safe until November 1995. Tr. I at 354-55. We find it unlikely that the appellant would have turned the money over to Brunholtz in March 1995 and had Brunholtz sign the seizure form in November 1995 if he intended to deceive Brunholtz. Thus, we find that the appellant provided a plausible explanation for the November 21, 1995 date, and that the totality of the circumstances do not support a finding that he falsified this date. Therefore, we find that the administrative judge erred in citing the appellant's reference to November 21, 1995 as the seizure date to support his finding that the agency proved Charge 3. *See, e.g.*, *Deskin*, 76 M.S.P.R. at 510-11.

The appellant also asserts that the administrative judge erred in considering alleged falsifications that were not specified in the notice of proposed removal and in finding that the appellant admitted that there were many other inaccurate statements in the November 24, 1995 seizure form. PFR at 16-17. We agree with the appellant that the administrative judge erred in finding that the appellant falsified the seizure form by misstating the location of the transaction. I.D. at 14. This error was not cited in the notice of proposed removal as a false statement. IAF, Tab 3, subtab 5; *James*, 73 M.S.P.R. at 303-04.

The administrative judge did not address the alleged falsifications concerning the appellant's failure to mention in the seizure form the February 25, 1995 undercover operation, the tape recording, or the APD report. The agency, however, has not filed a petition for review contesting any error by the administrative judge in this regard. Thus, we find it unnecessary to further

consider these specifications. 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review).

Thus, we find that the agency sustained Charge 3.

Charge 4: Failure to Follow Written Instructions

Specification 1

The agency specified as follows: The appellant obtained the $3,000 from APD on March 7, 1995; he gave it to Brunholtz, who placed it in his safe; and it stayed there until November 21, 1995. When asked by OPR investigators why it had sat in the safe for over eight months, the appellant stated that "they" forgot about it and that his handling of the money was not standard procedure for the St. Louis Division. IAF, Tab 3, subtab 5.

The agency stated that Section 6663.41A of the DEA's Agent Manual states that physical custody of evidentiary property will be transferred by the acquiring agent to either the Seized and Recovered Monies Custodian (SRMC) or the field office Evidence Custodian (FOEC). Section 6663.67B states that all currency seized that is subject to civil forfeiture or criminal forfeiture must be delivered to the USMS (United States Marshals Service) using a DEA-48a for deposit within 10 days of seizure. The agency charged that the appellant failed to follow written instructions (presumably the DEA regulations) by failing to insure that the seized money was properly handled and placed into custodial care. IAF, Tab 3, subtab 5.

The administrative judge found that the appellant testified that he received the $3,000 on March 7, 1995, and that it was subject to criminal forfeiture. He also found that the money stayed in the DEA safe until November 21, 1995. He found that the appellant did not transfer physical custody of the $3,000 to either the SRMC or the FOEC as required, and that the $3,000 was subject to criminal forfeiture, but was not delivered to the proper depository within 10 days of

seizure. Thus, he found that the appellant failed to handle the $3,000 as required. I.D. at 16-17.

The appellant asserts that the administrative judge erred in sustaining this charge because Brunholtz was fully aware of his actions in regard to the $3,000. PFR at 53-55.

The agency offered general testimony that the money evidence must be turned over to asset forfeiture, *see e.g.,* Tr. II at 9-14 (Testimony of OPR Investigator Preson L. Grubbs), or "processed immediately," *see e.g.,* Tr. II at 82 (testimony of Fries). However, as previously noted, Brunholtz testified that, in this case, the funds were not considered to be seized or recovered monies--funds for federal forfeiture--until November 1995. Tr. I at 362, 370. He gave detailed testimony concerning when the regulation requirements would apply and why he believed that they did not apply in this case. Tr. I at 355-71. OPR Investigator Grubbs admitted that he did not know about the particular procedures applied in this case and that he did not ask Brunholtz about the procedures he used in his office concerning money. Tr. II at 17-19. Therefore, because the record reflects several opinions among the agency's management concerning the implementation of the regulation, we find that the agency has failed to sustain its burden of proving this specification by a preponderance of the evidence. *See, e.g., Tackett v. Department of the Air Force*, MSPB Docket No. DE-0752-97-0340-I-1, slip op. at 6 (Oct. 22, 1997); *Asberry v. Department of Justice*, 62 M.S.P.R. 603, 608 (1994). Thus, we find that the agency did not sustain Charge 4, specification 1.

Specification 2

The agency specified as follows: The appellant noted in his list of exhibits a tape recording of "Tammy and Vicki Meyer." His file did not include any DEA Form 6, report of acquisition of the tape or any DEA Form 7a. Brunholtz stated that he believed that the reports were never written and that the tape was never submitted to the St. Louis Division's non-drug evidence custodian. The agency

stated that DEA Agent Manual Section 6663.31A states that the circumstances surrounding the acquisition of any nondrug property will be fully reported on a DEA Form 6, and with the exception of property seized for forfeiture or abandonment, or any seized and recovered monies, any such acquisition will also be reported on a DEA Form 7a. Sections 6663.41A and 6663.42B state that physical custody of evidentiary property will be transferred by the acquiring agent to either the SRMC or the FOEC. IAF, Tab 3, subtab 5.

The agency stated that, in his April 30, 1996 sworn statement, the appellant stated that he had kept the tape in his drawer. The agency charged that his conduct disregarded the requirements for processing evidence because he did not correctly report the acquisition of the tape recording and did not submit the tape to the division's evidence custodian as required. IAF, Tab 3, subtab 5.

The administrative judge cited the appellant's testimony that he had custody of three cassette tapes involving conversations between Wilson and Vicki Meyer, Marshall's girl friend; that he kept the tapes in his desk drawer; that he did not submit the tapes to the non-drug evidence custodian; and that he then threw the tapes away. The administrative judge found that the appellant's actions violated the agency regulations. I.D. at 17-18.

The appellant asserts that the administrative judge erred in sustaining this specification. He cites his testimony that the prosecutor in the case, AUSA Massey, had already determined that the tapes had no evidentiary value, and that Massey declined to prosecute Meyer when he heard the tapes. He also cites Brunholtz's testimony that the policy of the St. Louis DEA office did not require that tapes be placed into evidence when a prosecutor had concluded that they have no evidentiary value. PFR at 50-53.

Again, the agency must show only that the information provided was incorrect, *see, e.g., Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555-57 (1996), and it offered general testimony that tape recordings should be put into

evidence, *see, e.g.,* Tr. II at 84, 156-57 (Testimony of Fries). A review of the hearing transcript, however, supports the appellant's description of his testimony that AUSA Massey had determined that the tapes had no evidentiary value. Tr. II at 395. The agency has presented nothing indicating that the testimony is false. Even though the administrative judge found the appellant not credible on other charges, we are not required to discredit his testimony on all issues. *Pedersen v. Department of Transportation*, 9 M.S.P.R. 195, 198 (1981). Moreover, as the appellant also asserts, Brunholtz testified that tapes lacking evidentiary value would not necessarily have to be placed in evidence. Tr. I at 374. Therefore, we also find that the agency has failed to sustain its burden of proving this specification by a preponderance of the evidence. *See, e.g., Tackett*, slip op. at 6; *Asberry*, 62 M.S.P.R. at 608. Thus, we find that the agency did not sustain Charge 4, specification 2.

Because we find that the agency did not sustain either specification 1 or 2 of Charge 4, we find that the agency did not sustain the charge.

Charge 5: Poor Judgment

The agency specified as follows: During the later part of 1995, the appellant asked Evelyn Brown, a personal friend, if a CI known as "Debbie" could stay with her for a week. The agency charged that the appellant's attempt to have a personal friend house a CI was inappropriate, could have jeopardized the confidentiality of the CI, and constituted poor judgment. IAF, Tab 3, subtab 5.

The administrative judge cited the appellant's testimony that he asked Brown whether a CI named "Dabbie" could stay with her for a week and that the arrangement never materialized because he told Brown that he had made other arrangements. He found that the appellant's attempt to have a personal friend house a CI was inappropriate because it could have jeopardized the confidentiality of the CI. I.D. at 18.

The appellant asserts that, although he asked Brown if Debbie could stay with her, he canceled the request in the same telephone conversation and did not mention that Debbie was a CI. PFR at 56-57. The appellant's testimony supports his assertion. Tr. II at 85. However, he has presented nothing to show that his request, even if withdrawn, did not constitute poor judgment. His mere disagreement with the administrative judge's findings in this regard do not provide a basis for Board review. *Weaver,* 2 M.S.P.R. at 133-34.

Thus, we find that the appellant has failed to show that the administrative judge erred in sustaining Charge 5.

Penalty

The appellant asserts that the administrative judge erred in assessing the reasonableness of the agency-imposed penalty. PFR at 58-68. When not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). Instead of imposing the maximum reasonable penalty, the Board will independently and responsibly balance the relevant *Douglas* factors to determine a reasonable penalty. *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 525-26 (1996). After careful consideration, we find that removal is a reasonable penalty for the sustained charges.

In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 135 (1997). The sustained Charges 1 and 2 were serious because they go to the heart of the appellant's duties, position, and responsibilities as a Criminal Investigator. The agency has shown by these two charges that the appellant took advantage of his position to coerce a confidential informant to have sex with him, and that he maintained a sexual relationship with that confidential informant in

violation of the DEA agent's manual and standards of conduct. Charge 5, on the other hand, involved a lapse of judgment which was quickly corrected. Accordingly, we find that Charge 5 should be given little weight in determining the reasonable penalty.

The appellant occupied the senior level nonsupervisory position in the DEA, and the agency gave him an elevated level of responsibility in his position. *See* Tr. II at 96. The appellant also was a law enforcement officer. An employee in a law enforcement position is held to a higher standard of conduct that that applied to other employees. *See, e.g., Wilson v. Department of Veterans Affairs*, 74 M.S.P.R. 65, 68 (1997). The deciding official testified, specifically with respect to the first three charges, two of which we have sustained, that the agency could not trust the appellant to perform the duties of his position and to engender faith in the DEA by the public. Tr. II at 97-98. Loss of trust is a significant aggravating factor. *Woodford v. Department of the Army*, 75 M.S.P.R. 350, 357 (1997).

The appellant asserts that the administrative judge erred in failing to consider his outstanding performance ratings, his commendations and awards, and the positive testimony concerning his character and his performance from his former supervisors. PFR at 63-67. Fries, however, considered that the appellant had an outstanding work record and had no prior disciplinary record. Tr. II at 96, 119, 162.

The appellant also asserts that the administrative judge erred in finding that he was not disparately treated. He contends that other DEA employees found guilty of similar misconduct, specifically Mark Moger, Gene Bachman, and Robert Matos, were not removed but received lesser discipline. PFR at 58-60. He also contends that Roth and Graves were involved in the same or similar misconduct and were not disciplined. PFR at 60-63. The appellant is correct in

asserting that the administrative judge misstated the evidence. *See* I.D. at 19. However, we find that the appellant has not shown that he was disparately treated.

To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). When the Board determines that a penalty is appropriate, proof of disparate treatment will not ordinarily require reversal or mitigation unless an agency knowingly and intentionally treats similarly situated employees differently or the agency decides to begin levying a more severe penalty for a certain offense without giving notice of the change in policy. *Social Security Administration v. Mills*, 73 M.S.P.R. 463, 473 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997) (Table). Moreover, where the Board determines that good cause exists to impose the appropriate penalty for the sustained misconduct, "the[] penalty will not be mitigated, regardless of the resolution of the[] claim of disparate treatment." *Id.*

Fries testified that he considered whether the penalty imposed on the appellant was consistent with penalties imposed in other cases. He acknowledged that other employees who had become involved with CIs were not removed. Tr. II at 99. Specifically, he acknowledged that Matos received only a 14-day suspension after engaging in sexual relations with a woman who claimed that she was a drug courier. He explained, however, that Matos was working in an undercover role, that he stopped the relationship when he became convinced that the woman was a drug trafficker, and that he was charged with improper association, not misuse of office. *Id.* at 99-101, 123. Fries stated that Bachman, a GM-14 supervisor, had a romantic relationship with a person who was no longer a CI. In contrast to both Matos and Bachman and as found by the administrative judge, the appellant used his position as a DEA officer to coerce Ms. Wilson to have sex with him knowing that she was a CI, and he continued the sexual

relationship with Wilson while she remained a CI. Matos and Bachman are therefore not similarly situated to the appellant.

Fries testified that he was not the deciding official in the Moger case. Fries further stated that the person with whom Moger had an affair was not a CI, and it was never shown that she had any involvement with drug traffickers. *See* Tr. II at 103. That is why, according to Fries, the deciding officials in this appeal and in the Moger matter were different, and the person with whom Moger had an affair was not a CI, in contrast to Ms. Wilson who was a CI at the time the appellant coerced her to have sex with him and during their continuing sexual relationship. Moger and the appellant are therefore not similarly situated.

As for Roth and Graves, they were not federal employees. Thus, they were not similarly situated to the appellant. For the above reasons and because the penalty of removal is warranted for the sustained misconduct, we find no basis to mitigate the penalty based on the appellant's claim of disparate treatment. *Archuleta,* 16 M.S.P.R. at 407.

In determining a reasonable penalty, the Board will consider, in certain circumstances, statements by deciding officials concerning what penalties they would have imposed had all of the charges not been sustained. *White*, 71 M.S.P.R. at 527-28. Fries testified that he would have removed the appellant based on any of the first three charges, that is, misuse of office, improper association, or falsification. Tr. II at 94-95. Moreover, we find that appellant's less than eight years of federal service are not enough to warrant mitigating penalty when weighed against the seriousness of his misconduct. *See, e.g., Wynne*, 75 M.S.P.R. at 137. Thus, we sustain the appellant's removal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.